

MITCHELL ALLEN

IBLA 88-495

Decided January 24, 1991

Appeal from a decision of the Alaska State Office, Bureau of Land Management, denying a request to amend Native allotment application F-15026.

Affirmed in part; set aside in part; and referred for hearing.

1. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments--Rules of Practice: Appeals: Generally

Where a Native allotment applicant alleges that he timely made an application for an allotment of a specific parcel of land with officials of the Bureau of Indian Affairs but, through no fault of his own, this parcel was not described in the application which the Bureau of Indian Affairs filed with the Bureau of Land Management, the applicant will be afforded a fact-finding hearing in which he may attempt to show that he did, in fact, make timely application for the parcel in question.

2. Alaska: Native Allotments--Alaska National Interest Lands Conservation Act: Native Allotments

Under sec. 905(c) of the Alaska National Interest Lands Conservation Act, 43 U.S.C. § 1634(c) (1988), an amendment to a Native allotment application may be filed only where the applicant is seeking land different from the land described in the original application. No amendment may be allowed where the applicant is seeking land in addition to that described in the original application.

APPEARANCES: Kathy J. Keck, Esq., Fairbanks, Alaska, for appellant; Bruce E. Schultheis, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Anchorage, Alaska, for the Bureau of Land Management; Lance B. Nelson, Esq., Assistant Attorney General, Anchorage, Alaska, for the State of Alaska, intervenor.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Mitchell Allen has appealed from a May 13, 1988, decision of the Alaska State Office, Bureau of Land Management (BLM), rejecting a request to amend his Native allotment application F-15026.

The case record discloses the following relevant background information. On June 18, 1971, Allen signed a number of Native allotment application forms, claiming use and occupancy of the land sought from June 1, 1942, the year of his birth. Although he left blank the description of the land requested, apparently with the understanding that the Bureau of Indian Affairs (BIA) would fill in the necessary description, he indicated that from 1942 to 1971 he had resided on and used the land annually from June 1 through September 30 for fishing and from November 1 through March 30 for trapping. He also stated that a cabin had been built on the land in 1950.

BIA certified Allen's Native allotment application and evidence of use and occupancy on January 11, 1972, and filed it with BLM on January 14, 1972, pursuant to the provisions of the Alaska Native Allotment Act of May 17, 1906, as amended, 43 U.S.C. §§ 270-1 to 270-3 (1970) (repealed effective December 18, 1971, by section 18(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. § 1617(a) (1988), with a savings provision for applications pending on December 18, 1971). The application, as filed, described one parcel of land "[o]n Tanana River - contains 40 acres (See Attached)." The attachment consisted of a map and a metes and bounds description of approximately 40 acres of unsurveyed land located within protracted sec. 26, T. 1 S., R. 13 W., Fairbanks Meridian.

By decision dated April 11, 1972, BLM rejected that application, stating that the lands identified in the application were located within another Native allotment for which an allotment certificate had been issued on May 16, 1939. Allen did not appeal that decision.

In December 1981, Allen submitted a document to BLM reciting the history of the filing of his Native allotment application and his use of certain lands. He stated that in July 1970 he went to the BIA office in Fairbanks and filed for 80 acres on the Tanana River and 80 acres on the Kantishna River, and that he was told that if the land he wanted was not available, he would be allotted land close to the requested land. He claimed that after his application was rejected, he refiled on the land, but heard nothing more about his refiled application. He also recounted certain problems with BIA, including its alleged loss of his records. Allen provided additional information substantiating his use of the Kantishna River parcel, including a cabin thereon, for trapping in the winter, and his use of the Tanana River parcel in the summer for fishing. He indicated that in 1954, when he was 12 years old, he independently used the parcels for trapping and fishing. He concluded by informing BLM that,

although he no longer had any interest in the land on the Tanana River, he now claimed 160 acres on the Kantishna River. ^{1/}

By memorandum dated March 5, 1984, the Tanana Chiefs Conference, Inc. (Tanana Chiefs), BIA's realty contractor, concluded that sufficient evidence existed to demonstrate that Allen had intended to apply for two parcels totalling 160 acres, that he had expressed this intent to BIA, but that BIA had inaccurately and incompletely transcribed this information on his Native allotment application submitted to BLM. Tanana Chiefs requested that BIA concur with their finding that Allen had applied to the Department for two 80-acre parcels prior to December 18, 1971, and ask BLM to restore the omitted acreage to his application.

BIA concurred in the findings in the memorandum and forwarded it to BLM, who considered it to be a petition for reinstatement of Allen's Native allotment application. The petition included a "Location Correction Form," signed and sworn to by Allen on February 28, 1984, explaining that the parcel on the Tanana River (Parcel A) should have been described as 80 acres within protracted secs. 22, 23, 26, and 27, T. 1 S., R. 13 W., Fairbanks Meridian, and a map showing the proper location of the parcel. BIA also enclosed an affidavit signed by Allen on February 28, 1984, stating that he had applied for two 80-acre parcels (Parcel A on the Tanana River and Parcel B on the Kantishna River) when he filed his Native allotment application with BIA in June 1971, and that he had assumed that BIA would properly complete the description of the lands he sought. A map attached to the affidavit placed Parcel B within protracted sec. 19, T. 3 S., R. 12 W., and sec. 24, T. 3 S., R. 13 W., Fairbanks Meridian. Also appended to the petition were affidavits from witnesses attesting to Allen's use and occupancy of the requested parcels, and a copy of the original Native allotment application signed by Allen and dated "6/18/71," but containing no land description.

By decision dated November 2, 1984, BLM partially reinstated Parcel A and rejected Parcel B. After reciting the history of Allen's Native allotment application, BLM determined that the evidence submitted with the petition for reinstatement accurately established the intended location of Parcel A at the time of the original application, in accordance with section 905(c) of the Alaska National Interest Lands Conservation Act (ANILCA), 43 U.S.C. § 1634(c) (1988), and accepted the petition as to 40 of the 80 acres in Parcel A.

^{1/} The record also contains an affidavit signed by Allen on Dec. 2, 1981, in which he states that in 1970 he applied for a Native allotment for two parcels of land, one on the Tanana River and one on the Kantishna River. He states that the application for the Tanana River parcel was rejected and the application for the Kantishna River parcel was lost. He further indicated that he refiled for 160 acres on the Kantishna River but was again rejected "for a number of reasons." Despite this statement by Allen, there is no corroborative evidence of such a filing, and no official application for 160 acres on the Kantishna River is in the case file.

BLM rejected the petition as to the additional 40 acres in Parcel A and the 80 acres in Parcel B, stating:

Where an Alaska Native allotment application is pending in the Department on the date of the repeal of the Allotment Act, an attempt to amend the application to encompass different or additional lands will not be considered as timely filed, and will be rejected as a new application barred by statute * * *.

The Department of the Interior is authorized to approve only Native allotment applications which were pending before the Department on December 18, 1971, the date the Act was repealed by the passage of ANCSA. Evidence of pendency before the [D]epartment shall be satisfied by any bureau, agency, or division time stamp, the affidavit of any bureau, division or agency officer, that he received said application on or before December 18, 1971, and may also include an affidavit executed by the area director of BIA stating that all applications transferred to BLM from BIA were filed with BIA on or before December 18, 1971.

No evidence has been submitted to show that the application originally on file for Parcel A was intended to be 80 acres, nor has evidence been submitted to show that there was an application for Parcel B on file with BIA on or before December 18, 1971; BIA's concurrence to the [Tanana Chiefs] memorandum * * * offers no proof that such an application existed. [Emphasis in original.]

(Nov. 2, 1984, BLM Decision at 2).

BLM informed Allen that it would continue normal processing of the application, as to the 40 acres in Parcel A. Allen did not appeal the decision. 2/

On February 17, 1988, BIA, on behalf of Allen, submitted to BLM a "Report of Investigation on Reinstatement of Acreage on Native Allotment Of Mitchell Allen F-15026 Parcel A & B" and, based on that report, recommended that BLM reinstate his Native allotment application for Parcel B to include 120 acres. As a result of the investigation, BIA concluded that, in 1971, Allen had in good faith contacted BIA in order to establish his claim to two separate 80-acre parcels; at that time, it had failed to document his claim appropriately; he had made a concerted effort to prove his claim; and it would be unjust to require Allen to pay for errors made by former BIA staff.

2/ The State of Alaska appealed the decision reinstating the application for 40 acres in Parcel A. Although the State claimed that all the land described as Parcel A had been tentatively approved to the State in 1963 and that BLM therefore had no jurisdiction to approve the allotment at the amended location, it withdrew its appeal on Jan. 25, 1985. The Board dismissed the appeal by order dated Mar. 25, 1986.

BIA determined that Parcel B should be reinstated for 120 acres because Parcel A had been reduced to 40 acres due to a conflict with lands tentatively approved to the State, and increasing the acreage in Parcel B would allow Allen to "get his full entitlement in accordance with the law." It attached an "Amended/Corrected Legal Description" for Parcel B describing 120 acres within the NW $\frac{1}{4}$ NW $\frac{1}{4}$ protracted sec. 19, T. 3 S., R. 12 W., and the N $\frac{1}{2}$ NE $\frac{1}{4}$ protracted sec. 24, T. 3 S., R. 12 W., Fairbanks Meridian, and a site location map. 3/

On May 13, 1988, BLM denied Allen's request to amend his Native allotment application. After noting that 43 CFR 2561.1(a) provides that a Native allotment application must be properly and completely executed on an approved form, BLM cited the principle that an application which on its face fails to meet regulatory requirements is subject to summary rejection without a hearing, even if a hearing would otherwise be required. BLM continued:

There is nothing in the records to substantiate that Mr. Allen intended to apply for 120 acres or that an amended corrected application and/or description was timely filed.

The information received from the BIA did not include a complete application on an approved form for an additional 120-acre parcel and there is nothing to substantiate that the application as pending on or before December 18, 1971, included 160 acres. Therefore, the request for reinstatement is considered a request for amendment.

Section 905(c) of [ANILCA], 43 U.S.C. § 1634(c) (1982), authorizes a Native allotment applicant to amend the description of the land in his application to accurately describe the parcel for which he applied. It does not authorize the allotment application to include additional or different land.

(May 13, 1988, BLM Decision at 2). BLM concluded that it had no authority to amend or accept an amended application for additional lands filed after December 18, 1971, and denied Allen's request to amend his application.

In his statement of reasons (SOR), Allen emphasizes that he intended to apply for 160 acres when he filed his Native allotment application with BIA in June 1971. 4/ He states that he signed six application forms on June 18, 1971, none of which contained a land description; BIA only filled

3/ By letter dated Apr. 5, 1988, BIA also forwarded to BLM a Feb. 1, 1988, memorandum from a Realty Specialist with the Tanana Chiefs, contending that an application for both parcels was on file with BIA on June 18, 1971, and enclosing Allen's original June 18, 1971, application, which contained no description of the lands sought.

4/ Allen filed his SOR pro se. Counsel entered an appearance for Allen in January 1989, and filed a reply to the State of Alaska's answer to Allen's SOR.

in a land description on one of the applications; and the land description was incorrect. He recites the history of his application, pointing out irregularities in BIA's handling of his allotment request. He notes BLM's subsequent refusal to allow him to reinstate and amend his application to conform to his original intent, despite BIA's admission of its errors and recommendation that the application be amended and reinstated.

Allen argues that where a factual dispute exists with respect to a Native Alaskan's allotment application, and the Secretary proposes to reject the application, the applicant is entitled to notice and an opportunity for an oral hearing prior to a rejection decision pursuant to Pence v. Kleppe, 529 F.2d 135, 143 (9th Cir. 1976). He contends that material issues of fact exist concerning both the amount and description of the land he intended to apply for in 1971, and that he is entitled to a hearing at which he can present oral evidence supporting his original intention to apply for 160 acres.

In its answer, BLM repeats the assertion included in its decision that Allen's Native allotment applications fail, on their face, to meet regulatory requirements and are subject to summary rejection without a hearing. Accordingly, BLM asks that the appeal be dismissed.

The State of Alaska, in its answer, concurs in BLM's request for dismissal, and, in addition, it argues that dismissal is proper because Allen's claims are also barred by the doctrine of administrative finality. 5/

The State bases this argument on the fact that Allen did not appeal BLM's November 2, 1984, decision rejecting his attempt to amend his application to include acreage in addition to the 40 acres sought in the original application. The State contends that Allen is attempting to resurrect the identical issues resolved by the 1984 decision, and that no legal or equitable basis exists for allowing Allen "to make an end run around the process to claim the exact same 80 acres plus 40 more" (State of Alaska's Answer at 5). It asserts that any claim Allen had to the 80 acres described as Parcel B in his 1982 petition for reinstatement clearly was extinguished by the 1984 decision. As far as the additional 40 acres added to Parcel B in the 1988 amended application are concerned, the State contends there is no equitable reason to allow Allen to claim this acreage and further notes that this new claim is directly contradicted by Allen's February 28, 1984, affidavit in which he stated that the original description should have been for

5/ By order dated Nov. 23, 1988, the Board granted the State's motion to intervene as a party-appellee. The State had indicated that the land described as Parcel B had been selected by the State on Jan. 22 and 25, 1962, and that the selection had been tentatively approved on Oct. 22 and 28, 1963. Accordingly, the Board agreed that the State was an interested party in the present proceeding and allowed it to file an answer to Allen's SOR. Pursuant to sec. 906(c)(1) of ANILCA, 43 U.S.C. § 1635(c)(1) (1988), subject to valid existing rights, all right, title, and interest of the United States in lands tentatively approved to the State vested in the State, as of the date of tentative approval.

two 80-acre parcels. Thus, the State opines that the doctrine of administrative finality mandates the dismissal of this appeal.

In reply to the State's answer, counsel for Allen reiterates that Allen is entitled to a hearing to determine whether he timely filed an application including Parcel B. Counsel asserts that failure to allow Allen this opportunity violates his due process rights. Counsel further contends that administrative finality does not bar the appeal because the appeal stems from the rejection of the second application filed in 1988, not the 1984 application. In any event, counsel argues, that doctrine does not bar relitigation of all claims, and reexamination of a decision is available when compelling legal or equitable reasons, including the prevention of an injustice, support such a reexamination. Counsel claims that just such an injustice would result if Allen is not granted a hearing to allow him to present evidence of the timely filing of his application and his use and occupancy of the land in Parcel B.

As an initial matter, we agree with Allen that the doctrine of administrative finality does not bar consideration of this appeal. Not only was BLM's 1988 decision based on a second amended application, but we also find that, even if the issues addressed were identical to those decided in 1984, sufficient equitable and legal reasons have been shown to warrant reexamining those issues. See, e.g., Turner Brothers Inc. v. OSM, 102 IBLA 111, 121 (1988), and cases cited therein. Therefore, we deny the State of Alaska's request to dismiss the appeal on the basis that it is barred by the doctrine of administrative finality.

[1] The Alaska Native Allotment Act, as amended, 43 U.S.C. §§ 270-1 through 270-3 (1970), authorized the Secretary of the Interior to allot up to 160 acres of vacant, unappropriated, and unreserved nonmineral land in Alaska to any Native Alaskan Indian, Aleut, or Eskimo, 21 years old or the head of a family, upon satisfactory proof of substantially continuous use and occupancy of the land for a 5-year period. That Act was repealed by section 18 of ANCSA, 43 U.S.C. § 1617 (1988), with a savings provision for applications pending before the Department on December 18, 1971. If an application was not pending before the Department on that date, BLM has no authority to grant the applicant's requested Native allotment.

BLM determined that no application for Parcel B was pending before the Department on December 18, 1971. Allen argues that when he applied for the land in June 1971, by submitting an application to BIA, he intended for the application to include Parcel B, but that BIA erroneously omitted Parcel B from the application it submitted to BLM. This Board has addressed similar assertions in numerous appeals. See, e.g., Donald Peter, 107 IBLA 272 (1989); William Carlo, Jr., 104 IBLA 277 (1988); Nora L. Sanford (On Reconsideration), 63 IBLA 335 (1982); Eleanor H. Wood, 46 IBLA 373 (1980). Although most of these cases dealt with situations in which corroborative statements by BIA employees were submitted to establish that a parcel had been inadvertently omitted from an application BIA had transmitted to BLM, both the Donald Peter and the William Carlo, Jr. cases considered situations similar to the one here, where no such corroboration exists. We concluded:

[W]hile the absence of any independent corroboration clearly weakens the evidentiary weight which may be accorded appellant's assertions, this does not work to alter the essential fact that appellant has, indeed, challenged factual predicates essential to the determination of BLM * * *. We believe that it is precisely this type of determination which, under the dictates of Pence v. Kleppe, supra, requires a fact-finding hearing in which appellant may be afforded an opportunity to establish that he did, indeed, timely make an application for Parcel B with officials of BIA.

William Carlo, Jr., supra at 282. See also Donald Peter, supra at 276, quoting William Carlo, Jr., supra.

Accordingly, we will refer this matter to the Hearings Division for assignment of an Administrative Law Judge to conduct a hearing in accordance with Pence v. Kleppe, supra. 6/ At the hearing, Allen shall have the burden of proving by a preponderance of the evidence that his application for Parcel B was pending with the Department on or before December 18, 1971. See William Carlo, Jr., supra. The Administrative Law Judge's determination shall be final for the Department, absent a timely appeal to this Board.

[2] In addition, we conclude, however, that Allen's claim for Parcel B must be limited to 80 acres. Section 905(c) of ANILCA, 43 U.S.C. § 1643(c) (1988), authorizes allotment applicants to amend land descriptions in Native allotment applications where the description in the application "designates land other than that which the applicant intended to claim at the time of application." It does not allow the applicant to add land to that originally described. Donald Peter, supra; William Carlo, Jr., supra at 283; Stephen Northway, 96 IBLA 301, 309 n.8 (1987); Charlie R. Biederman, 61 IBLA 189, 192 n.1 (1982).

Allen has consistently contended that Parcel B, as originally applied for, contained 80 acres, and his 1984 affidavit specifically stated that his original intent was to apply for two distinct 80-acre parcels: Parcel A consisting of 80 acres on the Tanana River, and Parcel B encompassing 80 acres on the Kantishna River. Allen is not now claiming that he misdescribed the land in Parcel B; rather, he seeks to add 40 acres to compensate for the 40 acres of Parcel A rejected by BLM in 1984, to make his total allotment 160 acres. This he cannot do. Accordingly, we affirm BLM's decision to the extent it rejected the 40 additional acres now claimed as part of Parcel B. 7/

6/ BLM's argument that the application forms, on their face, fail to meet regulatory requirements and are subject to summary rejection must be rejected. That argument is based on the present record. The question, however, is whether Allen should have the opportunity to establish that he had an application for Parcel B pending on or before the critical time. Under the circumstances, we believe he should.

7/ Should it be finally determined that Allen filed a timely application for Parcel B, BLM must make a preliminary determination, consistent with

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision is affirmed in part, set aside in part, and referred to the Hearings Division for further action consistent with this decision.

Bruce R. Harris
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

fn. 7 (continued)

Aguilar v. United States, 474 F. Supp. 840 (D. Alaska 1979), whether the United States should institute proceedings for the recovery from the State of the lands subject to Allen's application. See Elizabeth G. Cook, 90 IBLA 152, 155 (1985); Oleanna Hansen, 84 IBLA 150, 153-54 (1984); State of Alaska v. Thorson (On Reconsideration), 83 IBLA 237, 253-54, 91 I.D. 331, 340-41 (1984).